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COURT OF CRIMINAL APPEALS
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IN THE COURT OF

CRIMINAL APPEALS OF TEXAS

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JOHN CHRISTOPHER FOSTER, Appellant

VS.

THE STATE OF TEXAS, Appellee

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From the Third Court of Appeals, Cause Number 03-17-00669-CR and
the 403rd District Court of Travis, County, Texas,
Cause Number D-1-DC-17-201020

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APPELLANT'S RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW

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IN THE COURT OF

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JOHN CHRISTOPHER FOSTER, Appellant

VS.

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW John Christopher Foster, appellant, and respectfully submits this Response to the State's Petition for Discretionary Review.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The State's argument challenging evidence of self-defense isolates a precise admission of specific conduct fitting the State's theory of prosecution rather than evidence proving the conduct alleged in its indictment. Because the Court of Appeals properly viewed all evidence raising self-defense without weighing its credibility or any arguably inconsistent testimony, the Court properly applied the law.

Harm from denial of a self-defense charge is evaluated in terms of a

defendant's right to have the jury decide fact issues of a defense. The Court of Appeals' harm analysis was proper because there was no evidence that could support an implicit jury finding that self-defense was rejected. The State relies upon a legal sufficiency analysis inapplicable to harm review. Because the Court of Appeals properly applied the law in this case, the State's petition should be denied.

RESPONSE TO REASON FOR REVIEW NUMBER ONE:

> **The Court of Appeals properly found Appellant's evidence would support a finding that any injuries occurred during a struggle initiated by the complainant where he was in fear of his life.**

I. Record shows State abandoned only "grabbing" "squeezing" and "striking" not all other injuries and does not support any implicit amendment of the indictment to rely on a single injury.

The State's first reason for review is based on its abandonment of indictment allegations. State's PDR p. 7. It argued to the Court of Appeals, without support in the record, that these allegations were abandoned because they were not proved by evidence of serious bodily injury. Using a legal sufficiency argument, State claims its own failure to offer evidence showing other injuries were serious bodily injury prompted the abandonment and then that this shows it relied upon the scalp injury alone as the basis for conviction. State's PDR pp.7, 9, 11 - 13. First, nothing in the record supports the State's assertion for the reason it abandoned these allegations.

Second, the State drafted the indictment alleging serious bodily injury by use of a knife without specifying which injuries it would prove met the definition. Any lack of proof that other specific injuries were serious bodily injury resulted from a failure in the State's own presentation of evidence.

This retrospective reverse sufficiency argument ignores the indictment allegations and jury charge actually given. As correctly noted by the Court of Appeals, ". . . the indictment did not allege that Foster caused an injury to Morris's scalp." Slip Op. p. 12. To focus on a specific injury not even mentioned in the State's charging instrument because it did not offer evidence to prove those allegations misstates long accepted law on defensive issues. *See Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017)(when viewed in the light most favorable to the defendant, any evidence showing alleged conduct was in self-defense entitles defendant to an instruction). Review on direct or discretionary appeal is simply not the proper time to amend the indictment and jury charge to fit the evidence actually presented or theory of prosecution the State presented at trial.

The record shows the basis of conviction was the application paragraph. (CR 86). This required the jury find any injuries were caused ". . . by pulling Sarah Morris' hair, or by cutting Sarah Morris with a knife . . ." Slip Op. p. 2. As correctly noted by the Court of Appeals, nothing in this language limits conviction to a single

injury. Slip Op. p. 12. The Court of Appeals properly held the State's abandoned allegations did not affect the allegation that Morris was injured by cutting with a knife. Slip Op. p. 12. Not only was the charged conduct sufficient to cover injuries other than the scalp area, ". . . the defensive evidence also did admit, consistent with the charges presented in the indictment, that his actions resulted in Morris being cut with a knife." Slip Op. p. 12. The Court of Appeals correctly held the type of force admitted to by a defendant is not required to precisely match the State's theory. Slip Op. p. 13, *citing*, *Gamino*, 537 S.W.3d at 512.

II. Self-defense law does not require exact admission of each element of the offense.

The State cites *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007), for the proposition that "a defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense." State' PDR p. 10. This global description contradicts language in *Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. 2017), decided a decade later. In *Gamino*, this Court stated "Appellant was not required to concede the State's version of the events in order to be entitled to a self defense instruction. Admitting to the conduct does not necessarily mean admitting to every element of the offense." *Id.* at 512.

Moreover, *Shaw* is readily distinguishable because the "Good Samaritan"

defense was not supported by the evidence. No testimony showed that the defendant ". . . harbored some culpable mental state with respect to causing a head injury in the course of administering CPR . . ." *Shaw*, *supra,* at 660. Here, Appellant admitted causing injuries with a knife and testified he did so because he feared for his life during an attack by the complainant. (RR7 110)("I've never been so shaken up in my life about a situation, and I was afraid that she was definitely going to kill me that day."). The Court of Appeals properly held Appellant's description of a struggle where she was the aggressor wielding a knife, was sufficient to a fact issue concerning self-defense that should have been decided by the jury rather than the trial court. Slip Op. pp. 10 - 11.

III. Court of Appeals relied on fact specific authority.

The Court of Appeals did not improperly "pluck" a single portion of the record to support its holding that the evidence raised self-defense. It is interesting that the whole of the State's argument itself seems to hinge on a single statement, "I did not scalp her" that the State asserts is not credible in light of other testimony. State's PDR, pp. 11, 12. In contrast, the Court of Appeals considered all the evidence concerning self-defense and properly did not pass on its credibility. *See Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017) (self-defense raised "whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court

may think about the credibility of the defense").

The principal authority relied upon by the Court of Appeals is instructive. *See* Slip Op. p. 13. In the oft cited opinion in *Holloman v. State*, 948 S.W.2d 349 (Tex. App. - Amarillo 1997, no pet.), the defendant testified his wife threatened him with a knife and he feared he would "get killed." *Id.* His testimony was that they "tussled" and injuries occurred when he fell on her. *Id*. The *Holloman* Court held although he ". . . never expressly stated he had 'hit' his wife, . . . it could reasonably be said he conceded striking her." *Id.* at 352. Contrary to the State's argument, the Court of Appeals properly held Appellant admitted causing the injuries described in the indictment and presented evidence he acted in self-defense as a clear defensive theory. Slip Op. p. 10 - 11.This case only became a "I didn't do it" case when the self-defense instruction was denied.

RESPONSE TO REASON FOR REVIEW NUMBER TWO:

> **State's seeks to overturn statutorily mandated harm review standard by focusing on the credibility of the evidence rather than whether the record shows the jury considered self-defense and rejected it.**

I. Harm review in denial of defensive instruction cases focuses on the right to have a jury decide the fact issue.

The harm from refused defensive instruction is that the defendant was denied the right to have a jury decide a fact issue. *Cornet v. State*, 417 S.W.3d 446, 455 (Tex. Crim. App. 2013). This focus is dictated by statute. *See* Sec. 2.03 (d), Tex. Penal Code Ann. (2015)("If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted."). The statute grants the right to have the jury rather than the trial court decide whether the State disproved self-defense. *Gamino v. State*, 537 S.W.3d 507, 512 - 513 (Tex. Crim. App. 2017)(jury not the trial court should have passed on credibility of defendant's evidence of self-defense).

Denial of a defensive instruction can be harmless if the record shows the defensive fact issue was actually decided by the jury in absence of the instruction. *Id*. This occurred in *Cornet* because, "[b]y convicting appellant of orally contacting the complainant's anus, an offense to which the medical-care defense is inapplicable, the jury clearly determined that it did not believe appellant's testimony that he was

examining the child for her medical care." *Id*. Unlike *Cornet*, there were no other issues upon which the jury could have made a finding on self-defense independently of its guilty verdict based on the charge. The Court of Appeals properly avoided weighing further evidence outside of the fact issue not decided by the jury. Nor has the State identified any other fact issue that would have decided this matter.

II. State is arguing reviewing courts should weigh evidence that does not demonstrate the jury decided an issue of fact.

Because there was no other fact issue that could support an implied finding against self-defense, the State is essentially arguing that the other evidence of guilt is more credible than that raising the defensive issue. Weighing other evidence of guilt is not the same as evaluating whether the jury should have but did not pass on the fact issue. *Compare Gamino v. State*, 480 S.W.3d 80, 92 (Tex. App. - Fort Worth 2015), *affirmed* 537 S.W.3d 507 (denial of charge harmful because it was the jury's not the judge's role to decide if defensive evidence was credible) *with* Cornet *v. State*, 417 S.W.3d 446, 455 (Tex. Crim. App. 2013)(jury verdict on conduct where defense inapplicable was an implied finding against the defensive issue). The State's ground for review should be denied because it suggests a manner of review not supported by statute or other authority on this issue.

III. Appellant's jury argument did not ameliorate harm by arguing for acquittal because the charge did not permit argument on self-defense.

As the Court of Appeals noted, Appellant's defense from the beginning of trial was that the injuries occurred but were justified as self-defense. Slip Op. p. 16 - 17. When a self-defense instruction was denied, trial counsel was compelled to acknowledge to the jury that he was prevented from arguing that defense. (RR7 175). He then had to fall back on highlighting problems in the complainant's testimony. (RR7 175 - 178).

Appellant's jury argument does not represent an abandonment of the defense. It is simply a case of arguing any remaining issues after the self-defense instruction was denied. This situation illustrates exactly how preventing the jury from deciding this fact issue results in harm. *See Dugar v. State*, 464 S.W.3d 811 (Tex. App. - Houston [14th Dist.] 2015, pet. ref'd) ("When the trial court denied an instruction on appellant's sole defensive theory, the jury was given a charge that contained no vehicle with which it could acquit."); *Brazelton v. State*, 947 S.W.2d 644, 650 (Tex. App. - Fort Worth 1997, no pet.)(admission in argument that defedant caused injuries but only in self-defense harmful because ". . . the jury had no option to convict appellant.").

The Court of Appeals noted that during *voir dire* the trial court read the self-defense statute to the jury and explained that an instruction would be given only if the

evidence raised it. Slip Op. p. 16 - 17. The record shows the jury was told, "Self-defense is something that can come up if the evidence warrants it. *So you would only receive a charge on it if the evidence warranted it*." (RR5 156)(emphasis added). In other words, the jury had been told any fact issue concerning self-defense had already been decided by the trial court.

The Court of Appeals correctly held, not only was Appellant denied the right to have the jury decide this issue, he was also denied the right to argue the issue by the rest of the trial court's instructions. Slip Op. p. 13. Other authority has reached the same conclusion. *See Gonzales v. State*, 474 S.W.3d 345, 350 (Tex. App. - Houston [14th Dist.] 2015, pet. ref'd)("If the charge did not allow for a justification defense appellant could not reasonably argue to the jury that she did the stabbing and still expect to be acquitted."); *Johnson v. State*, 271 S.W.3d 359, 369 (Tex. App. - Beaumont 2008, pet. ref'd)(harmed because ". . . without a proper self-defense instruction included in the jury's charge, trial counsel was unable to further argue appellant's legal entitlement to an acquittal if the jury agreed with his theory"). Appellant's jury argument was compelled by the trial court's refusal of the self-defense instruction. Instead of ameliorating harm, this situation demonstrates how the denial of an instruction resulted in harm. Because the Court of Appeals properly applied the law, the State's Reason for Review should be denied.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays that this Court deny Discretionary Review of the Court of Appeals in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND WORD COUNT

The above signature certifies that on this day, January 21, 2019, a true and correct copy of the foregoing Petition this document was sent by electronic service to the Travis County District Attorney's Office, P.O. Box 1748, Austin TX 78767-1748 and to the State Prosecuting Attorney, P.O. Box 12405, Austin, TX 78711 and mailed to the appellant, John Christopher Foster, Texas Department of Crim. Just., Robertson Unit, 12071 FM 3522, Abilene, TX 79601. The above signature also certifies that this entire document contains 2471 words in compliance with Rule 9.4 (I) (2) (E), Tex. R. App. Proc. (argument not to exceed 2,500 words).